

## **2004 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION NEGOTIATION COMPETITION FACT PATTERN**

Along the Southern California coast on the tip of the Point Lerner Peninsula in Stuart County, an aggregate quarry business—a rock, aggregate, and sand mining operation—has operated and provided building materials for much of Southern California since the 1940s. In the same area, dozens of million dollar homes have been built ever closer to the quarry. The original quarry, consisting of 852 acres, 503 of which are underwater tide lots, was owned and operated by Rockslide Construction and Mining Co. until 1986, when it sold the entire property and operation to the Pollak Group. The current operator, Mad Max Quarry Company, is a wholly-owned subsidiary of Pollak. Both are owned by the mercurial but politically-well-connected Max Pollak.

The original quarry operated under a Stuart County zoning ordinance designating the entire area as M-2, heavy industrial. In 1976, as required by the California Surface Mining and Reclamation Act (“SMARA”), Pub. Resources Code §§ 2710 et seq., Rockslide Construction submitted a reclamation plan to Stuart County setting forth its plans for quarrying and reclamation of the area. In May 1982, Rockslide submitted a revised reclamation plan with more detail, stating the slopes, elevations, and depths of quarrying projected for each area of the quarry and that quarrying operations would cease “in 10 to 12 years.” In December 1982, Stuart County approved the revised reclamation plan under SMARA.

By 1982, the area surrounding the quarry had changed significantly. In recognition of these changes, and in order to encourage them, Stuart County changed the zoning of the area, including the quarry, to BFC-RMPC (Bayfront Conservation–Residential Multiple Planned Commercial). No surface mining or quarrying is allowed under that zoning designation. Existing uses rendered non-conforming because of zoning changes under Stuart County Ordinance, however, may legally continue as long as not enlarged, increased, extended, or moved.

The Pollak Group and Mad Max took over the quarry in 1986. Inevitably, the residents and the quarry have clashed. The residents believe that the quarry has increased operations, created a public nuisance, and violated the zoning laws, and the reclamation plan. Mad Max contends that it has benefitted the community through tax revenues, providing building materials, and maintaining the roads in the area.

Natalie Harrison, the lead plaintiff and firebrand, filed an action against the Pollak Group and Mad Max on behalf of the local residents and their ad hoc group, Mad at Mad Max, or M3. M3 makes three arguments.

1. Harrison and M3 allege that Pollak and Mad Max have violated the Stuart County zoning ordinance and have therefore violated Business and Professions Code §§ 17200 et seq. by committing unfair business practices. Harrison and M3 contend that mining and quarrying

became a non-conforming use in 1982 when Stuart County changed the zoning designation of the area including the quarry in 1982. Stuart County explicitly authorizes (as likely required by the Constitution, *see County of San Diego v. McClurken*, 37 Cal.2d 683, 686 (1951)), continuation of a previously allowed and lawful use of land after adoption of a zoning restriction that prohibits such use, as long as the continued use does not increase, expand, move, or become abandoned. In addition, Harrison and M3 recognize that in the case of mining or quarrying, non-conforming legal use can actually expand, provided that the expansion does not exceed the intent of the owner/operator at the time the use became non-conforming—here, in 1982. The leading case on the limited exception to the ban on expansion of non-conforming use in the case of “diminishing assets” is *Hansen Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County*, 12 Cal.4th 533 (1996).

Harrison and M3 contend that Mad Max’s vested right to continue and expand quarry operations as a legal non-conforming use is defined under *Hansen Brothers* by the objective intent of the quarry’s owner/operator at the time of the zoning change in 1982. According to Harrison and M3, Rockslide’s 1982 reclamation plan establish that intent, limit quarrying operations to “10 to 12 years,” which ended in 1994, and limit the depth of the mine to that set forth in the reclamation plan. Mad Max, Harrison and M3 allege, have mined wider, deeper, and for much longer than Rockslide intended in 1982. Mad Max does not dispute the claim. As a result, Harrison and M3 seek an immediate halt to quarrying operations.

2. Harrison and M3 allege that Pollak and Mad Max have violated Bus. and Prof. Code § 17200 (unfair business practices) by ignoring their reclamation plan. Even if Mad Max hasn’t violated the zoning restrictions, they have violated the limitations of their reclamation plan by exceeding in width and depth the mine footprint set forth in the plan. Under SMARA, the County reviews and approves reclamation plans. Mad Max has not submitted a new plan.

3. Harrison and M3 allege that Pollak and Mad Max have created a public nuisance under Civil Code §§ 3479 and 3480 by generating unhealthful levels of dust and suspended particulates which are deposited on the residential properties, injuring both health and property; by generating noise, diesel fumes, and vibrations from substantial truck traffic; by blasting at the quarry causing physical damage to the residential properties, air shocks, noise, and dust; by heavy equipment operation; and by piling of waste materials in mounds near residential properties.

Not surprisingly, Pollak and Mad Max have responses to these arguments.

1. Pollak and Mad Max attack the zoning ordinance violation argument in two ways. First, they contend that *Hansen Brothers* applies to alluvial sand and gravel mining, not deep quarrying. Alluvial sand and gravel mines expand over surface area and therefore need the *Hansen Brothers* diminishing asset exception for expansion of non-conforming use. Deep quarrying, however, retains the same basic surface footprint while mining deeper below the surface. They contend that no cases apply the doctrine of diminishing assets to limit the *depth* of a mine. As such, Mad Max is operating consistent with the original use at the time of zoning

change and does not need the limited expansion doctrine set forth in *Hansen Brothers*.

In addition, Pollak and Mad Max contend that even if *Hansen Brothers* applies, the objective intent for quarrying operations manifested at the time of the 1982 zoning change reflect a clear expectation by Rockslide that quarrying would continue indefinitely, as long as the market for material exists. Pollak and Mad Max point out that the reclamation plan required that Rockslide estimate the expected lifespan of the quarry. The reclamation plan states that Rockslide “expects” the quarry to operate for 10 to 12 years “based upon present estimates of likely market demand.” The reclamation plan makes no other statement about timing of quarry closure. With respect to the depth, the reclamation plan states only that the “anticipated maximum depth” is 175 feet. Pollak and Mad Max have quarried to a depth of 221 feet. Pollak and Mad Max contend that “market demand,” not 10 to 12 years, reflects the intent in 1982 of the life of the quarry, and that the “anticipated” maximum depth does not reflect an objective manifestation of intent that sets a bright line limit at 175 feet.

Finally, Pollak and Mad Max point out that the reclamation plan also contemplates quarrying at an area close to a number of residences, called Lerner Hill. So far, Pollak and Mad Max have not excavated that area, but believe that they have a vested right to do so regardless of how a court interprets *Hansen Brothers*. Pollak and Mad Max have hired an engineering firm to evaluate such operations.

2. Pollak and Mad Max respond to the reclamation plan violation claims in the same manner: the language of the reclamation plan is ambiguous and cannot give rise to a legal duty in the manner argued by Harrison and M3. The reclamation plan does not limit their vested right and can simply be amended if necessary.

3. With respect to the nuisance claims, Pollak and Mad Max contend that they have gone above and beyond their legal duties by controlling dust, limiting time of operations, maintaining county roads well beyond those used directly for operations, carefully maintaining waste piles, and blasting on a limited basis under strict safety controls.

Max Pollak is very well connected politically in Stuart County and has generally received favorable treatment for his business ventures. He is concerned, however, that the *Hansen Brothers* case limits his ability to continue to operate the mine absent a change in zoning that he is not sure the County will approve. He is also aware that the local residents, including Harrison and M3, are very concerned about possible quarrying operations at Lerner Hill. Pollak would like to operate the quarry for a number of additional years, but ultimately turn the area into an expensive, exclusive development with a marina. He is willing to consider some operating restrictions to placate the neighbors as long as he can continue quarrying.

Pollak has agreed to meet first with Harrison and M3 to talk about the quarry operations, and, then later with the County to discuss zoning issues and site development. Therefore, there will be two separate negotiations, first between Pollak/Mad Max and Harrison/M3 (Round 1),

and second, between Pollak/Mad Max and the County (Round 2).<sup>1</sup>

## **Round 1**

Pollak and Mad Max are in a better position practically than they are legally. They know that the County is concerned that if the quarry operation is shut down prematurely, it will cost developers--and the County--more to import quarry material from long distances. Thus, the County may be motivated to try and change the zoning to allow continued use of the quarry. Of course, such a zoning change would be opposed by M3 and its millionaire members, making the politics of a zoning change unpredictable. More importantly, Pollak and Max believe that, if necessary, they could shut down the quarry immediately and still make money by accelerating plans to develop the area for high cost housing and a marina. That process, however, could take years, and they would like to have the quarry operating during the planning and permitting. In light of all of these considerations, Pollak and Mad Max would like to try and resolve issues with Harrison and M3.

For its part, Harrison and M3 have taken somewhat contrasting positions in public. M3 as an organization has stated that it might agree to allow continued quarry operations if strong measures to limit the nuisance are taken. Harrison, whose house is among the closest in proximity to the quarry, has vowed to shut down the quarry. Privately, Harrison, who is the president of M3, has indicated that she will go along with the wishes of the organization as long as the any settlement reflects sufficiently strong constraints on quarry operations.

The parties have narrowed the discussion to the following issues.

### **1. Duration of Use.**

A. How long can Pollak and Mad Max continue to quarry? M3 wants to limit operations by a total volume based on the 1982 reclamation plan. Pollak and Mad Max are willing to consider limiting quarrying to a number of years;

B. Can Pollak and Mad Max quarry on Lerner Hill? Under the 1982 reclamation plan, Lerner Hill is fair game. M3 is willing to allow continued quarrying in excess of what they believe to be the reclamation plan limits in the main pit if Pollak and Max stay out of Lerner Hill. Both parties recognize that Lerner Hill is the big prize.

### **2. Conditions of Use.**

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<sup>1</sup>Harrison/M3's and the County's interests may be at odds. It is therefore almost certain that the County and Harrison/M3 would have different counsel in this matter. For purposes of this exercise, however, counsel will represent Harrison/M3 in the first round and the County in the second round, without reference to any ethical dilemmas.

M3 seeks significant constraints to operation for:

- A. Hours of Operation. Current operations are 6 days a week, from 6 am until dark.
- B. Truck Traffic
- C. Noise
- D. Vibration/blasting. Current blasting limits are based on safety issues only.

These items are essential, particularly for Natalie Harrison. So far, Pollak and Max believe that the M3 proposals would preclude viable quarry operations.

### 3. Monitoring and Dispute Resolution

M3 wants a full time monitor and a mechanism to pursue violations. Pollak and Max are resisting.

M3 will present a proposal on all issues to open negotiations.

## **Round 2**

**( For purposes of this negotiation, assume that there has been no agreement reached between M3 and Pollak/Mad Max).**

Stuart County had hoped that M3 and Pollak/Mad Max would reach agreement so that they could avoid the dispute. All five County Supervisors receive substantial campaign contributions from Max Pollak, and at least three of them receive money from wealthy M3 members. Unfortunately for the County, it cannot avoid the dispute. The County has certain legal remedies not available to the private parties. First, the County can change the zoning to allow quarrying (as opposed to a non-conforming use). Only one Supervisor has expressed an interest publicly in changing the zoning, and she faced substantial criticism in the local press. In addition, the County is the lead agency under SMARA. The County approves and enforces the reclamation plan. The County can insist that Pollak submit a new reclamation plan and has some authority to reject a plan that it does not like.

The County is not sure what it wants at the site. The quarry is an important source of building material for much of Southern California. Its closure would add costs to many developments, and developers have lobbied the County to ensure that it is not closed. On the other hand, wealthy, politically savvy residents want the facility closed, and the County would benefit from a new marina and high cost development. The County thinks that if it can hold off the residents for a set period, it can get more use from the quarry and start the development process. The County has publicly floated the notion that it would agree to five more years of quarry operation with operational constraints. Max Pollak has angrily rejected the idea.

The County is clearly interested in resolving this matter, but will file suit if it has to. Max Pollak believes that he can obtain some concessions related to the development of the site. These parties have somewhat different issues than did M3 and Pollak.

1. Duration of Use

The County is less concerned about Lerner Hill than it is about the length of time Pollak/Mad Max will operate the quarry. The County has proposed 5 years, which Pollak has rejected.

2. Conditions of Use

Pollak realizes that he must reach some understanding with the residents and will propose a mediation process.

3. Monitoring and Enforcement

Pollak also realizes that it must have some monitoring, and will propose a solution.

4. Development

Pollak wants a streamlined development process in exchange for resolution of other issues. The County supports development of the area but does not want to be too closely associated with Pollak and his plans years before the development will proceed.

Pollak will present a proposal on all issues to open negotiations.